Nos. 82-354, 82-355, 82-388

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*,

Petitioners

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,

Respondents

CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION,

Petitioners

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,

Respondents

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,

Petitioners

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,

Respondents

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMICI CURIAE AMERICAN COLLEGE OF PREVENTIVE MEDICINE AMERICAN ACADEMY OF PEDIATRICS AMERICAN COLLEGE OF EMERGENCY PHYSICIANS AMERICAN PUBLIC HEALTH ASSOCIATION ASSOCIATION OF TEACHERS OF PREVENTIVE MEDICINE NATIONAL ASSOCIATION OF REHABILITATION FACILITIES REHABILITATION INSTITUTE OF CHICAGO AMERICAN TRAUMA SOCIETY NATIONAL SPINAL CORD INJURY ASSOCIATION

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QUESTION PRESENTED

Whether recission of the passive restraint provisions of Federal Motor Vehicle Safety Standard 208 by the National Highway Traffic Safety Administration was arbitrary and capricious.

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BRIEF OF AMICI CURIAE
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NATIONAL ASSOCIATION OF REHABILITATION FACILITIES
REHABILITATION INSTITUTE OF CHICAGO
AMERICAN TRAUMA SOCIETY
NATIONAL SPINAL CORD INJURY ASSOCIATION

INTERESTS OF AMICI CURIAE

Amici Curiae collectively represent those within our society who experience first hand the consequences of governmental action in the area of motor vehicle safety. As physicians, health care providers, and accident victims,

they represent those who will be ultimately and perhaps most greatly affected by the judgment of this Court. All are united in their strong support for the passive restraint provisions of Federal Motor Vehicle Safety Standard 208 ("FMVSS 208"), and equally strong in their opposition to the government's rescission thereof, for the reasons stated below.

The American College of Preventive Medicine (ACPM) is a national medical specialty society composed of over 2,000 individual physician members. One of the objectives of the organization is to "foster education and protection of the public regarding health promotion and disease prevention." The College has consistently and publically stated its position of support for FMVSS 208 and the passive restraint provisions thereof.

The American Academy of Pediatrics (AAP) is comprised of more than 24,000 pediatricians throughout the United States and Latin America. Founded over 50 years ago, the AAP works to promote the physical, mental, and social health of infants, children, and young people. To that end, the AAP has been especially instrumental in promoting vehicle and traffic safety to reduce the deaths and injuries of young people caused by automobile accidents. In particular, the Academy has developed a nationwide network of pediatricians whose mission it is to institute public education and legislative campaigns in order to abate unnecessary automobile death and injury to children. Furthermore, the Academy disseminates more than 19,000 pieces of educational and promotional materials on child passenger safety each month. Pediatricians and AAP staff work to educate other physicians, maternal and child health educators, pediatric nurses, parents, and other concerned people about the need to protect infants and children in automobiles.

The American College of Emergency Physicians (ACEP) is a professional association of 11,200 physi-

cians who practice emergency medicine. The College has a particular interest in motor vehicle accident prevention since its members are usually the first physicians to have contact with the victims of automobile accidents. In 1977 the Board of Directors of the College adopted a policy statement endorsing the passive restraint provisions of FMVSS 208.

The American Public Health Association (APHA) is a non-profit professional society with a combined national and affiliate membership of over 50,000 health professionals throughout the United States. Founded in 1872, the APHA works to promote personal and environmental health by setting standards for alleviating health problems, launching public campaigns about specific health dangers, and publishing numerous materials reflecting the latest findings and developments in public health. For decades, the APHA has maintained an active interest and involvement in the issue of automobile safety.

The Association of Teachers of Preventive Medicine (ATPM) is an academic society composed of medical school departments of preventive and community medicine as well as individual medical school faculty who teach preventive and community medicine. As such, members of the Association are in the forefront of medical education as it relates to community-wide efforts to prevent disease, injury, and death. As the leading cause of death for a significant portion of the population, automobile accidents, their causes and sequelae are of utmost concern to the Association's membership.

The National Association of Rehabilitation Facilities (NARF) is the principal national membership organization representing institutions providing both medical and vocational rehabilitation services. Among its membership are 40 freestanding rehabilitation hospitals and approximately 80 rehabilitation units within general hospitals. One of these, the Casa Colina Hospital for Rehabilitative Medicine ("Casa Colina, Inc."), in Pamona, California,

has recently conducted a study, "Rehabilitation of Motor Vehicle Accident Victims—One Hospital's Experience", which indicates that rehabilitation costs for automobile accident victims may be of greater significance than previously thought. Casa Colina serves the California counties of Los Angeles, San Bernardino, Riverside and Orange. Such freestanding hospitals and units provide comprehensive rehabilitation care designed to restore injured and disabled people to their maximum achievable levels of function. A large number of the patients are victims of trauma. Of these, a substantial portion have experienced injuries in automobile accidents. As a result of treating people with such injuries, NARF members have firsthand experience with serious injuries caused by automobile accidents and their high cost to society.

The Rehabilitation Institute of Chicago and Northwestern Memorial Hospital comprise the Midwest Regional Spinal Cord Injury Care System, the largest of the 17 Spinal Cord Centers in the United States. In the years 1973-1981 there were 4,340 people admitted to the 17 Spinal Cord Systems. Forty-six percent (46%) of those people were injured in motor vehicle accidents.

The American Trauma Society (ATS) is an organization of physicians, health care professionals, parents, and teachers dedicated to insuring the availability and effectiveness of emergency medical systems throughout the United States. Such systems are concerned with the prevention as well as the treatment of traumatic injury, including automobile and industrial accidents and other traumatic injuries, which together kill 100,000 individuals each year, 28,000 of which are front seat passenger car occupants.

The National Spinal Cord Injury Association (NSCIA) is a voluntary health agency which is dedicated to a comprehensive approach to the problem of spinal cord injury, including programs aimed at the prevention of spinal cord injury, services to spinal cord injured per-

sons and their families, and research toward an eventual cure for the paralysis resulting from spinal cord injury. Because the Association views passive restraints as a successful method of preventing spinal cord injuries in automobile accidents, which are currently the leading cause of such injuries, the Association is particularly interested in bringing about the full utilization of such restraints.

In accordance with Supreme Court rule 36.2, Amici have obtained and filed with the Court the written consent of the parties to submit this brief amicus curiae.

SUPPLEMENTAL STATEMENT OF THE CASE

Amici adopt and incorporate by reference the statement of the case contained in the brief filed by respondents State Farm Mutual Automobile Insurance Co. et al. The following additional information, however, is of particular concern to Amici.

Magnitude of the Problem

According to the latest available data, motor vehicle accidents are the fifth leading cause of death in this country, and are the leading cause of death for persons 1-34 years of age. In 1978, 51,500 persons died in motor vehicle accidents, of which approximately 28,000 were front seat occupants. An additional two million persons suffered disabling injuries in 1978 as a result of motor vehicle accidents.

This translates to the following morbid statistics: every 10 minutes someone dies in a traffic accident; injuries, many of which are the major cause of paraplegia, epilepsy, and cerebral palsy, are sustained at the rate of one every 8 seconds; the number of persons killed each day, 140, is the equivalent of a major airline crash. During their lifetime, individuals have a 1 in 100 chance of dying in an automobile accident, and a 1 in 3 chance of suffering a disabling injury as the result of an automobile accident.

The economic costs of motor vehicle accidents are equally staggering, from $24.3 billion to $29.3 billion per year in 1981 dollars for all injuries and fatalities and from $15.8 billion to $18.9 billion per year in 1981 dollars for accidents involving front seat occupants.[1]

Were these deaths and disabling injuries caused by an infectious agent, their occurrence would be considered an epidemic. However, death and disability from automobile accidents are not caused by a mysterious infectious agent but are in fact caused by man-made technology. Like other epidemics such as tuberculosis, typhoid fever, diptheria, and polio, death and disability from automobile accidents can be enormously reduced through the application of other available, man-made technology. Delay in imposition of that technology has already meant the needless loss of over 130,000 lives over the past decade, lives that would have been spared had we employed the technology we had at our disposal. Other lives have been detrimentally affected, representing tremendous loss to society as well as to the individuals involved.

Spinal Cord Injury

The two major disabilities resulting from motor vehicle accidents are cerebral trauma and spinal cord injury. Injury to the head or spinal cord often results in death or irreversible motor and sensory deficits. The medical problems of persons who survive such an injury are monumental, and the impact on our society of the costs and uses of medical resources for these problems is enormous.[2] The national mean cost for one person's in-

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[1] See *Comments of William Nordhaus on Notice of Proposed Rulemaking on Federal Motor Vehicle Safety Standards Occupant Crash Protection*, NHTSA Docket No. 74-14, Notice 22, May 26, 1981, Table A-2.

[2] Jess F. Kraus, "Injury to the Head and Spinal Cord: The Epidemiological Relevance of the Medical Literature Published from 1960 to 1978," *The National Head and Spinal Cord Injury Survey*, National Institute of Neurological and Communicative Disorders and Stroke, November, 1980.

jury, acute and rehabilitation care on a first time basis is $54,269. This figure reflects all those within the system with a spinal cord injury, not just those most severely disabled.

A generally typical case history is the following: Carol Smith (the patient's name has been changed because of pending litigation), a 28 year old female, was being driven home by her boyfriend at approximately 11:30 p.m. January 1, 1979. The roads were slick; the car was going only 15 miles per hour when it hit a patch of ice and swerved into a viaduct. Neither the driver nor the passenger was restrained. Carol was thrown forward causing her spinal cord to be severed at the cervical—5 vertebrae, rendering her quadriplegic.

Prior to her accident Carol was a research associate in hematology at Rush-Presbyterian Medical Center in Chicago. She had just returned from Alaska where she had traveled and worked for six months. Her injury has forced her to revise her career plans and has necessitated her return to graduate school and a switch in major from biology to psychology. "There is no place for a BA in biology who can't use her hands," she states.

Since the Department of Vocational Rehabilitation will not pay for graduate studies, Carol must incur those costs herself along with the $8,000 necessary for a van with a specially designed lift system.

Although previously stated that the mean cost for first time acute and rehabilitative care is $54,269, because of the nature and severity of her injuries, Carol's costs for one month in the Acute Spinal Cord Department of Northwestern Memorial Hospital and five months in the Rehabilitation Institute of Chicago totalled $73,379.99. Attendant care at home presently costs $750.00 per month. Her medication and supplies are currently paid by the state, and although she does not know the exact cost of these, she says that they are continually rising.

Recently Carol's attendant quit unexpectedly, putting her life once again into utter chaos. She articulately states the despair she feels over the loss of control she experiences and the anger at the dependency on other people, and on state and federal agencies. Because of her disability, both her range of choices and her ability to make choices, as that of her family, have become extremely limited. Those problems do not have a price tag.

Cerebral Trauma

Motor vehicle accidents are the prime cause of head injury, accounting for 51% of all nationally reported cerebral trauma and 61% of the cerebral trauma patients seen at the Rehabilitation Institute of Chicago. For brain injury the annual direct care plus indirect costs (e.g., foregone or reduced earnings, etc.), were estimated to be $3.9 billion in 1980 dollars,[3] thereby making motor vehicle related cerebral trauma figures approximately $2 billion per year.

An example of such a head trauma case is David Canner, a 28 year old, married male with a 19 month old son. On January 31, 1982 at 5:30 p.m., as he was driving home from work, his car hit an icy patch on a very familiar stretch of highway that accesses the Indiana Tollway. Canner, who was not wearing a safety belt, lost control, skidded into a pole, went into a ditch and was thrown into the back seat of the car, suffering massive brain injuries.

He spent four months in a coma in Gary Methodist Hospital in Indiana and then was transferred to Northwestern Memorial Hospital for one month where his acute care continued. He was then sent to the Rehabilitation Institute of Chicago for seven months of rehabili-

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[3] Dallas W. Anderson, William D. Kalsbee, and Tyler D. Hartwell, "The National Head and Spinal Cord Injury Survey: Major Findings," *The National Head and Spinal Cord Injury Survey*, National Institute of Neurological and Communicative Disorders and Stroke, November, 1980.

tation. His wife estimates his bill for that period of time to exceed $400,000.

As an insurance adjuster for Farm Bureau Insurance Company, he was well protected financially for this catastrophe, but he is not covered for the costs of hiring a fulltime practical nurse, or parttime physical therapist, and a visiting nurse.

The accident that has left him paralyzed on the right side of his body, confined to a wheelchair, and unable to resume his previous role in the family has devasted his parents and his wife. Although he is significantly improved since returning home six weeks ago, their lives will never be the same. Once active and assertive, the goals for David Canner are limited now to being able to be left alone for short periods of time, to be able to dress himself and perhaps to find employment in a sheltered workshop. David's wife, Kathy, reflects that these "accidents" always happen to someone else, not to someone you love, not to your own family.

Injury to Children

Motor vehicle accidents are the leading cause of death and injury to children. More than 150,000 children 0-14 years old sustain disabling injuries in motor vehicle accidents each year in the United States.[4] In 1971-1972, the latest year for which figures are available, there were approximately 79,000 days of restricted activity due to motor vehicle-related injury in children less than 17 years of age, and there were also more than 15,000 days lost from school.[5]

Of the 1,500 children killed under the age of four in 1978, some 800 were motor vehicle occupants. In com-

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[4] National Safety Council: Accident Facts. 1979 Edition. Chicago, 1979

[5] Wilder D: Persons injured and disability days detailed by type and class of accident. United States, 1971 and 1972. U.S. DHEW, Health Resources Administration, National Center for Health Statistics, 1976

parison, in the same year, less than 640 children under 4 years of age died of cancer.[6] In 1978, more than 50,000 motor vehicle occupants under five years of age sustained injuries requiring an emergency room visit.[7]

Recent data indicate that proportionally more infants are killed in motor vehicle accidents than older children. Despite the fact that children under one year travel less than 1 to 5 year olds,[8] their death rate is higher. Children less than six months of age have an occupant death rate of 9.1 per 100,000 population compared with a rate of about 3 per 100,000 population for three year olds.[9]

If a collision occurs, and the child is properly restrained, he or she can usually be decelerated at a rate that is tolerable to the body and injuries do not occur or are minimal. If unrestrained, the consequences are horrifying. Upon impact, the child becomes an unguided missile that is launched on a course which may lead to injury or death. Thirty-five per cent of unrestrained children are ejected from motor vehicles, often to land head first on the street.[10] Other children frequently come into contact with other occupants of the car and this may injure the other person as well as the child.[11] Many come into contact with various components of the interior

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[6] Ibid., National Safety Council

[7] Baker SP: Deaths and injuries to children as motor vehicle occupants. Presented at the National Conference on Child Passenger Protection. Washington, DC, Dec. 10-12, 1979

[8] Ibid.

[9] Baker SP, Karwacki JJ: Children killed in crashes. Proceedings of the Twenty-Third Conference of the American Association for Automotive Medicine, 1979, pp 335

[10] Sherz RG: Fatal motor vehicle accidents of child passengers from birth through four years in Washington state. Presented at the National Conference on Child Passenger Protection. Washington, DC, Dec. 10-12, 1979

[11] Williams AF: Warning: in cars, parents may be hazardous to their children's health. Washington, DC, Insurance Institute for Highway Safety, 1978

of the motor vehicle which are not designed to cushion the impact as gently as possible; injury, often severe or lethal, is the result.

If the child is on the lap of another passenger and both are unrestrained, they continue in a crash to move in the original direction of travel until they strike something. Under these circumstances, the child may be crushed between the interior of the car and the adult body. If the child is on the lap of a restrained individual, the restrained person remains seated, but the child goes flying. In experimental situations, adults lose their grip on a child-size dummy even in instances of relatively common deceleration. To illustrate, in a crash at about 30 miles per hour, a 15-20 pound 6-month old child exerts a force equivalent to an apparent weight of some 600 pounds.

This carnage and waste contrasts dramatically with the man-made technology we have at our disposal to prevent it.

For over a decade the American automobile industry has had at its disposal proven and effective means of automobile occupant restraints which are the subject of this case. As discussed in detail in respondent's brief, both air bags and nondetachable belts have been subjected to billions of miles of real world experience, in which they have been proven to be effective means of death and injury prevention. Over the past decade, hundreds of thousands of lives have already been irrevocably damaged or lost by delay in imposition of a commonsense solution to a major public health problem. Extrapolation to the future of the data on death and injury over the past decade provides a sobering picture of the potential consequences of the outcome of the Court's decision in this matter.

It is for these and other reasons that Professor Nordhaus has labeled the passive restraint provisions of FMVSS 208, "from an economic point of view, as im-

portant as any environmental, health or safety rule now on the books".[12] From a human point of view, this may be one of the most important cases to come before this Court, affecting as it does so many lives.

In 1963, at the height of the polio epidemic, 3,000 Americans died. America rushed to develop a vaccine. Today, more than 3,000 people die of automobile related injuries in less than one month. Acceptance of this appalling statistic in light of the measures we have at our disposal to substantially prevent it is analogous to admonishing people to stay out of crowded theaters and swimming pools while withdrawing polio vaccine from use.[13]

SUMMARY OF ARGUMENT

Although the National Highway Traffic Safety Administration's (NHTSA) decision to rescind the passive restraint provisions of FMVSS 208 is not sustainable under the deferential Administrative Procedure Act standard and scope of review, rescission of protective regulations involving significant health and safety issues should be subject to close judicial scrutiny to ensure that rescission is not contrary to Congressional mandate.

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[12] Comment of William O. Nordaus, John Musser Professor of Economics at Yale University, May 26, 1981, R. 511, 514.

[13] Rescission of the passive restraint provisions would not even guarantee individuals the right to exercise their freedom of choice to have passive restraints. Notwithstanding the assertion of Petitioners Consumer Alert and Pacific Legal Foundation that "those who favored it (the passive restraint provision) can still purchase cars equipped with passive belts," Petitioners' brief at 5, passive restraints are not widely available as an option on automobiles sold in the United States. Volkswagen and Toyota do offer passive restraints as an option on their "top of the line" models and Mercedes Benz has recently announced that it will offer a passive restraint system that does not meet the 208 standard; otherwise passive restraint systems are not available as options. Amici would further note that it is preposterous to suggest that innocent children are able to exercise their "consumer choice" in this matter.

ARGUMENT

I. Although, as respondents correctly argue, the Court of Appeals has neither applied an inappropriate standard nor broken new ground in enunciating a new scope of review in this case, in rescinding a regulation, particularly *where that regulation involves significant public health and safety issues*, an agency should be required to make a showing that *public health and safety* is *better* served by rescission than by retention.

A. *"Arbitrary and Capricious" Test*

As respondents State Farm Mutual Automobile Insurance Co. correctly argue, the standard for review in this case is the "arbitrary and capricious" test embodied in *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402,414 (1971) *citing* 5 U.S.C. Section 706(2)(A). The scope of review embodied in *Overton Park*, as applied by the Court of Appeals, is also appropriate in this case.

As respondents point out, a long line of judicial opinions require that "an agency changing course must supply a reasoned analysis" of the factors justifying a change. *Greater Boston Television Corp.* v. *F.C.C.*, 444 F.2d 841, 852 (D.C.Cir. 1970) (Leventhal, J.) (emphasis added), *cert. denied*, 403 U.S. 923 (1971). Furthermore, as the Court pointed out in *Atchison, Topeka & Santa Fe Railway Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 807-8 (1973), a "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. *There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to.*" (emphasis added)

Furthermore, where an agency rescinds regulation which was at one time presumed to be in furtherance of an agency's mandate, it should make a showing that past rationale for the regulation is not being "casually ignored." *Greater Boston Television Corp.* v. *FCC.* 444

F.2d 841,852 (D.C.Circuit 1970) (Leventhal J.), 403 U.S. 923 (1971).

Amici concur with the analysis of respondents *State Farm*, et al. regarding the application of the reasoned analysis test to this case and agree that such was lacking in NHTSA's final decisionmaking to rescind the passive restraint provisions. However, Amici further argue that where substantial issues of public health and safety are entrusted to an agency, rescission of a safety regulation should be based upon a strong showing that safety is being promoted and not undermined by rescission.

B. *Safety is the "Overriding Consideration" in Issuing Motor Vehicle Safety Standards*

The overriding purpose of the National Traffic and Motor Vehicle Safety Act of 1966 was to "reduce traffic accidents and related costs and deaths and injuries resulting from traffic accidents." 15 U.S.C. Section 1391. The Act directed that the Secretary of Transportation "shall" issue motor vehicle safety standards. 15 U.S.C. Section 1392(9). The issue of safety was addressed in the Senate report accompanying S.3005, wherein the report stated:

> "The Committee intends that safety shall be the overriding consideration in the issuance of standards under this bill." (Senate Report #1301, 89th Congress, 2nd Session at 6 (1966)). *See also* HR Rep. 1776, 89th Congress, 2nd Session at 16 (1966).

It was in response to this mandate that the issue of passive restraints was first raised by NHTSA in 1969. The history of the passive restraint provision is reviewed in depth in respondents' brief and will not be repeated here, except to point out that over a 12 year period the passive restraint provision has been acknowledged by successive Secretaries of Transportation and Administrators of NHTSA, up to and including the current Administrator, to be a means of saving lives. Clearly, prior to the

October 1981 rescission of the passive restraint provisions, definitive movement toward implementation of the provisions was a "settled course of behavior" as the best means of preventing death and injury attributable to the "second collision." Presumably, unsuccessful Court challenges to the rule during this period made it clear that NHTSA was acting in fulfillment of its safety mandate by proceeding with the regulation. The question then is whether NHTSA has shown that rescission is now the more effective means of fulfilling its safety mandate.

In light of the fact that the National Traffic and Motor Vehicle Safety Act of 1966 is a "technology forcing" statute, it was clearly Congress' intent that NHTSA, where appropriate, take positive action to *most effectively* promote motor vehicle safety. For over a decade the presumption has been that traffic safety would be most effectively promoted by implementation of the passive restraint provision. NHTSA's sudden change in its course of behavior, beyond being non-arbitrary, should therefore be based upon a strong showing that rescission of the passive restraint provisions advances public health and safety to a greater degree than does retention of these provisions. Otherwise NHTSA is at risk of acting contrary to its mandate by *jeopardizing*, rather than *advancing*, safety.

Viewed from this perspective, NHTSA's emphasis of factors other than safety, or those on which it ultimately appears to base its decision, is clearly given disproportionate weight in its decisionmaking. On the other hand, support for the proposition that rescission advances safety to a greater degree than does retention is virtually nonexistent in the record.

With the backdrop of a planned "education campaign" to increase usage of manual belts, NHTSA engages in conjectural reasoning regarding consumer acceptance of passive belts, the resentment such technology might provoke, and its impact on the government's credibility.

Within the context of its mandate, its analysis is misplaced and given inappropriate weight. *Safety* is to be NHTSA's overriding consideration. Although public acceptance is clearly a "factor" to be considered,[14] NHTSA appears to have been immobilized by a factor which is clearly in the realm of public policy, correctly the domain of Congress. As demonstrated by its intervention to forbid regulation involving the ignition interlock, Congress is capable of expressing the public will; it is not the role of NHTSA to either second-guess the public will nor to cower from its mandate for fear of Congressional intervention.

NHTSA's appropriate role here is to "exercise the discretion with which Congress has empowered it." *Burlington Truck Lines, Inc.* v. *U.S.* 371 U.S. 156, 168 (1962) and *promote* safety by at least "forcing" industry to utilize superior existing technology if it finds the detachable belt to be of minimal additional merit, rather than *jeopardizing* safety by capitulating to the plans of industry to implement the standard by means of a clearly inferior technology. Clearly Congress intended NHTSA to be the guardian of traffic safety by, among other things, taking regulatory action where appropriate to insure that the private sector is employing the best available technology in the pursuit of traffic safety.

Within the context of the social contract, it is every citizen's reasonably implicit assumption that its government is at all times representing the best interests of the public. A government's credibility depends upon the extent to which this is perceived to be the case by its citizens. Where, as here, an agency fails to show how

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[14] As the Court in *Pacific Legal Foundation* v. *DOT*, 593 F.2nd 1338 (D.C. Circuit) *cert. denied*, 444 U.S. 830 (1979), pointed out, public acceptance of passive restraints is a factor to be considered here. However, the Court did not imply that public acceptability should be a major factor, nor that safety standards be subject to "popularity contests."

it is exercising the discretion Congress has entrusted to it to promote the public's safety, that very credibility is undermined. In the view of Amici, therefore, rescission of the passive restraint provision is far more threatening to governmental credibility than is some amorphous concept of consumer acceptance.

If NHTSA is unable to show that rescission is in greater furtherance of safety than is retention, it is therefore unable to show that a change in its "settled course of behavior" is not contrary to its mandate. As petitioners point out, NHTSA's decision to rescind, even standing alone, is not "supported by evidence." *ICC* v. *Union Pacific R.R.*, 222 U.S. at 547-48. If juxtaposed against the additional safety that will result from rescission, the decision to abandon the passive restraint provision is clearly without support in the record.

II. NHTSA's decision to rescind the passive restraint provisions of FMVSS 208 at the eleventh hour was a sudden reversal and a decision not to proceed to regulate as mandated by Congress. As such it is distinguishable from its earlier decision to change course and set an implementation date for the standard.

Health and safety regulation as proposed and mandated by an agency whose mission it is to issue such cannot be viewed in a vacuum. An agency's decision to go forward with regulating or not must be viewed in the context of its mandate. As the Court stated in *Scenic Hudson Preservation Conference* v. *FPC*, 354 F.2nd 608, 620 (2nd Cir. 1965) *cert. denied* 384 U.S. 941 (1966) regulatory agencies do not function "as an umpire blandly calling balls and strikes for adversaries appearing before them." In the area of motor vehicle safety standards it was clearly Congress' intent that NHTSA move forcefully to insure motor vehicle safety. It is in this light that Petitioners' Pacific Legal Foundation and Consumer Alert repeated reference and analogy to

NHTSA's "change in course" in 1977 must be viewed. In July of that year Secretary Adams decided to dispense with previous Secretary Coleman's demonstration project and instead set an implementation date for the passive restraint provisions. On petitions for review, the United States Court of Appeals for the District of Columbia sustained the modified standard and the decision to implement it as a matter of judgment *which was otherwise supported by the record. Pacific Legal Foundation* v. *DOT* 593 F.2nd 1338 (D.C. Circuit) *cert. denied*, 444 U.S. 830 (1979).

Although its decision to change course and issue the passive restraint provisions was upheld by the Court of Appeals in *Pacific Legal*, NHTSA's action there is distinguishable from its recent decision to abandon the passive restraint provision for, among other reasons, the 1977 decision was one to *proceed* with regulation, which is part of NHTSA's mandate, rather than dispense with regulation. The presumption, especially where the settled "course of behavior" is toward regulation, should be that the agency is best fulfilling its mandate through regulatory means. If clear error is being made in the process of regulating, it will certainly become evident upon judicial review. Where, over time, regulation is accepted as the most effective means of fulfilling Congressional mandate, a reversal in that course of conduct should be more suspect than a continuation of the regulatory scheme.[15]

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[15] Notwithstanding Petitioners' obvious interest in the theoretical debate over the relative merits of regulation versus deregulation, Amici will not be lured into a discussion of such abstract concepts. With tens of thousands of lives lost each year in preventable traffic accidents, we as a society do not have the time to luxuriate in such a debate as it applies to passive restraints. Loss of life is not theoretical; it is painfully real to automobile accident victims and their families.

CONCLUSION

For the reasons stated herein, Amici contend that the decision of the National Highway Traffic Safety Administration was a blatant and unconscionable betrayal of the public trust conveyed to the agency by Congress. As such it was arbitrary and capricious, as the Court of Appeals correctly found. The decision of the Court below should therefore be affirmed.

Respectfully submitted,

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